Supreme Court, U.S.
FILED

96 - 8 JUL 1 1996

OFFICE OF THE CLERK

No.

IN THE

United States Supreme Court

OCTOBER TERM, 1996

MIRIAM JUANA FONTAO
Petitioner

-vs-

UNITED STATES OF AMERICA
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

FRANCISCO VILLARRUEL (P34147)
Attorney for Petitioner Fontao
1633 First National Building
Detroit, Michigan 48226
(313) 963-3311

CRAIG A. DALY, P.C. (P27539)
Co-Counsel for Petitioner Fontao
577 E. Larned, Suite 240
Detroit, Michigan 48226
(313) 963-1455

BOWNE OF DETROIT
610 W. CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

37 pp

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WAS PETITIONER DENIED HER RIGHT TO CONFRONTATION BY THE ERRONEOUS ADMISSION OF THE PARTIALLY REDACTED CONFESSION OF THE NON-TESTIFYING CO-DEFENDANT?

II. WERE PETITIONER'S DUE PROCESS RIGHTS DENIED BY THE PRE-INDICTMENT DELAY?

III. WAS PETITIONER DENIED DUE PROCESS OF LAW BECAUSE THERE WAS INSUFFICIENT EVIDENCE AT TRIAL TO SUSTAIN A VERDICT ON ATTEMPT POSSESSION WITH INTENT TO DISTRIBUTE COCAINE AND WHERE THE TRIAL COURT ERRONEOUSLY DENIED PETITIONER'S MOTION FOR DIRECTED VERDICT?

IV. WAS PETITIONER DENIED A FAIR TRIAL BY THE DELIBERATE INJECTION INTO EVIDENCE BY AN AGENT THAT SHE WAS THE SUBJECT OF ANOTHER DRUG INVESTIGATION?

V. WAS PETITIONER DENIED HER RIGHT OF CONFRONTATION WHEN THE TRIAL COURT REFUSED TO DISCLOSE THE PRESENTENCE AND PRETRIAL SERVICES REPORTS OF A WITNESS AND REFUSED TO ADJOURN THE TRIAL TO OBTAIN THE INCOME TAX RETURNS OF THE INFORMANT?

VI. DID THE GOVERNMENT'S MISCONDUCT IN CLOSING ARGUMENTS VIOLATE PETITIONER'S RIGHT TO A FAIR TRIAL BY VOUCHING FOR THE CREDIBILITY OF A COOPERATING CO-CONSPIRATOR AND BY DENIGRATING DEFENDANT'S

RIGHT TO TRIAL, RIGHT TO COUNSEL, PRESUMPTION OF INNOCENCE, AND RIGHT TO HAVE THE GOVERNMENT PROVE HER GUILT BEYOND A REASONABLE DOUBT IN THIS CASE?

TABLE OF CONTENTS

	Page
Statement of Questions Presented for Review	i
Index of Authorities	iv
Opinions and Orders Below	1
Statement of Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	9
Conclusion	24
Appendix	
Opinion of the United States Court of Appeals for the Sixth Circuit, dated April 18, 1996	1a

INDEX OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

	Page
U.S. Const. Am V	21
U.S. Const. Am VI	15, 21

FEDERAL CASES

Arizona v Fulminante, 499 US , 111 S Ct 1246, 113 L Ed 2d 302 (1991)	12
Boyde v California, 494 US 370, 110 S Ct 1190, 108 L Ed 2d 3196 (1990)	23
Brady v Maryland, 373 US 83, 83 S Ct 1194, 10 L Ed 2d 25 (1963)	19
Bruton v United States, 391 US 123, 88 S Ct 1620, 20 L Ed 2d 476 (1968)	10
California v Green, 399 US 149, 90 S Ct 1930, 26 L Ed 2d 489 (1970)	10
Coy v Iowa, 487 US 1012, 108 S Ct 2798, 101 L Ed 2d 857 (1988)	18
Donnelly v DeChristoforo, 416 US 637, 642-643, 94 S Ct 1868, 40 L Ed 2d 437 (1974)	20
Eberhardt v Bordenkircher, 605 F2d 275 (6th Cir 1979)	23
In Re Winship, 397 US 358, 90 S Ct 1068, 25 L Ed 2d 368 (1970)	15
Jackson v Virginia, 443 US 307, 99 S Ct 2781, 61 L Ed 2d 560 *reh denied,* 444 US 890, 100 S Ct 195, 62 L Ed 2d 126 (1979)	15
Napue v Illinois 360 US 264, 79 S Ct 1173, 3 L Ed 2d 1217 (1959)	20
Pierce v United States, 86 F2d 949 (6th Cir 1936)	23
Pointer v Texas, 380 US 400, 85 S Ct 1065, 13 L Ed 2d 923 (1965)	9

	Page
Richardson v Marsh, 481 US 200, 107 S Ct 1702, 95 L Ed 2d 176 (1987)	10
Schneble v Florida, 405 US 427, 92 S Ct 1056, 31 L Ed 2d 340 (1972)	13
Taylor v United States, 985 F2d 844 (6th Cir 1993)	22
United States v Andrea, 538 F2d 1255 (6th Cir 1976)	18
United States v Atisha, 804 F2d 920 (6th Cir 1986), *cert denied,* 479 US 1067, 107 S Ct 955, 193 L Ed 2d 1003 (1987)	13
United States v Bakke, 942 F2d 972 (6th Cir 1991)	17
United States v Balleaux, 685 F2d 1105 (9th Cir 1982)	17
United States v Blankenship, 775 F2d 735 (6th Cir 1985)	17
United States v Brown, 959 F2d 572 (6th Cir 1984)	13
United States v Causey, 834 F2d 1277 (6th Cir 1987), *cert den,* 486 US 1034, 108 S Ct 2019, 100 L Ed 2d 606 (1988)	22
United States v Craven, 478 F2d 1329 (6th Cir 1973), *cert denied,* 414 US 886, 94 S Ct 54, 38 L Ed 2d 85 (1973)	16
United States v DiCarlantonio, 870 F2d 1058 (6th Cir 1989)	12
United States v French, 974 F2d 687 (6th Cir 1992)	17
United States v Garber, 471 F2d 212 (5th Cir 1972)	18
United States v Gomez-Lemos, 939 F2d 326 (6th Cir 1991)	9, 10, 19
United States v Gray, 468 F2d 257 (3rd Cir 1972)	18
United States v Huddleston, 485 US 681, 108 S Ct 1496, 99 L Ed 2d 771 (1988)	17
United States v Marion, 404 US 307, 92 S Ct 455, 30 L Ed 2d 468 (1971)	13

Page

United States v McDonald, 435 US 850, 98 S Ct 2182, 33 L Ed 2d 18 (1978) 13

United States v Mehrmanesh, 689 F2d 822 (9th Cir 1982) 17

United States v Monroe, 943 F2d 1007 (9th Cir 1991) .. 22

United States v Ortiz, 507 F2d 1224 (6th Cir 1974) ... 18

United States v Payne, 923 F2d 595 (8th Cir 1991) ... 12

United States v Perez-Garcia, 904 F2d 1534 (11th Cir 1990) 12

United States v Perryman, 889 F2d 104 (6th Cir 1989) .. 16

United States v Roberts, 618 F2d 530 (9th Cir 1980) ... 22

United States v Smith, 500 F2d 293 (6th Cir 1974) ... 23

United States v Wallace, 848 F2d 1464 (9th Cir 1988) .. 22

United States v Young, 470 US 1, 105 S Ct 1038, 84 L Ed 2d (1985) 20

United States v Zelinka, 862 F2d 92 (6th Cir 1988) .. 17

United States v Williams, 704 F2d 315 (6th Cir 1983) .. 16

Vincent v Parke, 942 F2d 989 (6th Cir 1991) 13

FEDERAL STATUTES

18 USC § 2 2

18 USC § 3500 20

21 USC § 841(a)(1) 2

21 USC § 841 (a)(1), 846 2

21 USC § 846 2

MISCELLANEOUS

Fed. R. Evid. 404(b) 17

Fed. R. Crim. P. 52(a) 18

No.

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1996

MIRIAM JUANA FONTAO
Petitioner

-vs-

UNITED STATES OF AMERICA
Respondent

Petition for a Writ of Certiorari

NOW COMES, Petitioner MIRIAM JUANA FONTAO, and prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in the above case on April 18, 1996.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is attached in the Appendix.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed on April 18, 1996. The jurisdiction of this Court is invoked pursuant to Rule 12 of this Court and Title 28, United States Code § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V: "No person shall... be deprived of life, liberty or property without due process of law..."

United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him... to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Petitioner MIRIAM JUANA FONTAO was convicted of Conspiracy to Possess With Intent to Deliver Cocaine, 21 USC § 846; Attempt Possession With Intent to Distribute Cocaine, 21 USC § 841(a)(1), 846; and Aiding and Abetting, 18 USC § 2 after a jury trial in the Eastern District of Michigan, Southern Division. On January 13, 1995, Petitioner was sentenced to a term of 188 months. Petitioner appealed as of right and her conviction was affirmed in an opinion issued on April 18, 1996 in the United States Court of Appeals for the Sixth Circuit.

The indictment charged crimes committed on or about January 10, 1988 through February 5, 1988. The Indictment was returned on January 13, 1993 and filed on January 20, 1993. A Motion to Dismiss the Indictment because of prejudicial pre-Indictment delay was argued and denied.

AGENT EDWARD KACEROSKY, from United States Customs in Miami, Florida testified that the investigation began on January 11, 1988 with a telephone call from Robert Collazo, a government informant (Vol I, p. 43). Collazo said he received a telephone call from Juanita, the day before, asking if he had access to a source that could supply 100 kilograms of cocaine to Detroit (Vol I, p. 46). Kacerosky told Collazo that if Juanita called again to arrange a personal meeting with Juanita and an

uncover agent acting as the source (Vol I, p. 46). Kacerosky told Agent Bilis that a meeting had been arranged by Collazo (Vol I, p. 48). Bilis was to act as the source of supply of cocaine (Vol I, p. 49). A tape of this meeting was played for the jury (Vol I, p. 61). The tape revealed legitimate discussions about coins (Vol I, p. 75). Specifically, there were conversation about jewelry, old coins, coin collecting, cuban gold coins, as well as real estate and apartments (Vol I, pp. 72-78). A second meeting between the informant and Juanita was arranged for January 28, 1988 (Vol I, pp. 78-79, 81). A tape recording of this meeting was played for the jury (Vol I, p. 103). The recording disclosed a discussion about one-half (1/2) million dollars for a house, a black man who had a recording studio, flights to Detroit from Miami, the availability of money for expenses of the trip, and 100 kilograms of cocaine on credit (Vol I, pp. 104-107).

On January 30, 1988, the agents watched the informant and undercover agent meet Juanita at Miami International Airport (Vol I, p. 116). Kacerosky identified Petitioner in court as "Juanita" (Vol I, p. 116). When the plane arrived in Detroit, they were met by the Co-Defendant ERIK GALLEGO (Vol I, p. 117).

On February 2, 1988, the informant contacted Kacerosky (Vol I, p. 121). A meeting was arranged by the informant with Juanita (Vol I, pp. 123-124). A tape of this conversation which occurred on February 3rd, was played for the jury (Vol I, p. 124). Kacerosky prepared 50 kilograms of sham cocaine to show at the meeting (Vol I, p. 128). Petitioner Fontao was not present at this meeting. On February 4th, the Co-Defendant, undercover agent and informant took a flight from Miami to Detroit (Vol II, p. 13). Later, the Co-Defendant was seen in the presence of Robert Hill while at the Renaissance Center (Vol II, p. 16). On February 5th, the Co-Defendant and Robert Hill were arrested at the Grosse Ile Airport (Vol II, p. 20).

After the arrest of the Co-Defendant, Eric Pagani-Gallego was interrogated and gave a statement (Vol II, p. 24). The prosecutor told Agent Kacerosky before reading the Co-Defendant's statement:

> Now, I want to tell you something right now! *Pursuant to an objection by counsel concerning names of individuals, I don't want you to name any individual by name.* (Vol II, p. 24) (emphasis added).

The Co-Defendant's statement read to the jury was as follows:

> A. He indicated to me that he — he acknowledged that the transaction that had occurred he knew to involve cocaine. He indicated that he expected to be paid money for his participation in the scheme. *And he indicated that other individuals in Miami were involved in the scheme.* (Vol II, p. 24) (emphasis added).

During cross examination by the Co-Defendant's attorney, the following occurred:

> Q. Were you personally aware of any other investigations that Mr. Collazo had been involved in prior to the investigation in question?
>
> A. Yes. As I stated, there was one other, my recollection is there was one other active investigation that was ongoing at that time. That investigation involved the use of Go-Fast vessels that would be used, which would mean very fast speed boats that were being used to smuggle cocaine, or were intended to be used to smuggle cocaine from the Bahamas to South Florida. The investigation became centered on the number of people. *There was an overlap and some of the subjects in that case*

> *were some of the subjects in this case.* (Vol II, p. 43) (emphasis added).

Kacerosky conceded that there was no evidence that Petitioner was involved in the shipment of cocaine, money laundering or any commission for the sale of cocaine (Vol II, p. 79). Nor was Petitioner arrested during the exchange of any cocaine or money (Vol II, p. 89).

ROBERTO COLLAZO was the government's paid informant. He was an admitted drug dealer, thief and liar, who first met the Petitioner seven (7) years before in a night club in Hialeah, Florida (Vol III, p. 32, 72; Vol IV, p. 16). Several months before January 1988, they spoke about some people interested in buying "some coke up north" (Vol III, p. 34). Collazo then contacted Kacerosky about the conversation (Vol III, p. 34). Collazo then introduced an undercover agent (Bilis) to Petitioner telling her that he had the "merchandise" to deliver up north (Vol III, p. 36). They agreed to meet at Willie's place (Vol III, p. 38). Willie had a legitimate export business of goods and services to Cuba (Vol III, pp. 78, 81). At this meeting between Collazo, Petitioner and Willie, Petitioner said the Co-Defendant wanted them to go to Detroit to meet "the main person" (Vol III, p. 40). When Collazo and Petitioner arrived in Detroit, they were met by the Co-Defendant who drove them to Robert Hill's business (Vol III, p. 41). The Petitioner was to receive a $500 commission per kilo (Vol III, p. 44). A person identified as "Queen", later identified as Johnny Ace Smith, then met Collazo at the studio, where they discussed the "type of merchandise" to be delivered and possible future deals for heroin (Vol III, p. 60). Queen gave Collazo a black bag containing $300,000 (Vol III, p. 60, 62). Collazo left to an airport with the Co-Defendant and Hill following (Vol III, p. 64). They were arrested at the airport and Collazo returned to the studio where Queen was arrested (Vol III, p. 66).

Collazo had previously been convicted of two (2) drug offenses, fraud and two (2) theft convictions (Vol III, p. 68, Vol IV, pp. 14-15). In the present case, Collazo was to receive twenty-five (25%) percent of whatever money was seized which amounted to $140,000 (Vol III, p. 69). He could not recall if he reported this money as income to the Internal Revenue Service (Vol III, p. 112). Defense counsel than sought Collazo's income tax returns for impeachment (Vol IV, pp. 4-5). The trial judge refused to adjourn the case to allow counsel an opportunity to obtain the returns (Vol IV, p. 5).

AGENT VICTOR AYALA was posing as a drug trafficker in a "reverse buy" on February 3, 1988 (Vol IV, pp. 37-38). After the Co-Defendant's arrest, he was questioned by Ayala. The following statement by the Co-Defendant was elicited:

Q. What did he tell you about this deal?

A. Yes. *He told me that at the beginning he was approached by the person in Miami.*

Q. When you say "this person" he gave the name; correct?

A. Yes. *I'm trying not to say the name.* You said not to say.

Q. Okay. I just wanted to make sure that when you say "this person" he did, in fact, give a name and you now are putting the words in "this person"?

A. Yes.

Q. Okay. And what did this person discuss? According to the Defendant, what did this person discuss?

A. He was offered by this person if he wanted to make some easy money. So he agreed, and he was briefed what was the deal.

Q. Let me ask you this. *Without telling me the person's name, the person was not the confidential informant?*

A. No.

MR. ESCOBEDO: I'm going to object, Judge.

THE COURT: I think you ought to move on. (Vol IV, pp. 58-59) (emphasis added).

Ayala never met the Petitioner (Vol IV, p. 85).

ROBERT HILLS, a convicted drug dealer, owned a recording business, R & R productions, in 1988 (Vol IV, pp. 96, 103). Hills was to meet some people to buy and sell drugs (Vol IV, p. 97). In the present case, Hills pled guilty and agreed to testify in exchange for a sentence of 4½ to 6 years (Vol IV, p. 99). Prior to his testimony, the defense sought release of or Hill's Presentence report and Pretrial Services Report (Vol I, p. ; Vol III, p. 3). The District judge reviewed the requested documents, refused to allow the attorneys to see them and sealed them (Vol II, p. 3).

AGENT JON RIDDLE was the case agent in Detroit. Riddle spoke to the Co-Defendant. The prosecutor cautioned Riddle not to use the names the Co-Defendant used in his conversation (Vol IV, p. 197). Riddle then told the jury that the Co-Defendant told him:

Q. What, if anything, and again *remember by caution,* what if anything did he tell you concerning his involvement?

A. *Mr. Pagani told us that he was approached by an individual who asked him if he would like to make some money in the Detroit, Michigan area.* And as a result of that, he came to the Detroit, Michigan area and arranged for the deal where a hundred

> kilograms of cocaine would be sold to individuals here in Detroit — (Vol IV, pp. 198-199) (emphasis added).

It was stipulated that Johnny Ace Smith, a fight promoter, died on March 10, 1989 (Vol V, p. 20). A Motion for Directed Verdict was denied (Vol V, pp. 10, 21).

In his closing argument, the prosecutor argued to the jury the content of the Co-Defendant's confession as follows:

> The second one is longer. *He gives detailed information identifying people by name who are involved in this transaction with him* (Vol V, p. 31) (emphasis added).

The prosecutor also argued the credibility of Robert Hill in his opening remarks as the informant as follows:

> Ladies and gentlemen, unfortunately, you will find out coke is not involved in this deal. I cannot bring the Pope in before you and have the Pope testify about the drug deal he did. I had to bring in people who were involved in the drug deal, drug dealers, people who admitted readily, I was involved in this drug deal, who admitted readily, *I am going to get something in return for my truthful testimony,* someone who admitted that, if I lie, it's all out the window and I go to jail for a long time. (Vol V, p. 35) (Emphasis added).

He also argued, over objection, the following:

> But in reality, *even though everybody knows they did it, even though we know the person confessed, they still have the right to come in here and have an attorney come in and try to argue that they didn't do it.*
>
> MR. VILLARRUEL: Objection, we don't have a burden to do anything. That's improper argument.

MR. WATERSTREET: I didn't say they had a burden, Judge. I said they have an opportunity.

THE COURT: Just proceed with your argument. Hopefully by 12:00 o'clock. (Vol V, p. 69) (emphasis added).

* * * *

It's not this impossible burden. *Jurors have made it every single day. People have been found guilty every single day.*

MR. VILLARRUEL: Object to that, Judge, what juries do every day.

THE COURT: Just proceed with your argument.

MR. WATERSTREET: Thank you, Judge. (Vol V, p. 70) (emphasis added).

The trial court denied a second motion to dismiss for pre-Indictment delay (Vol V, pp. 112-113).

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS DENIED HER RIGHT TO CONFRONTATION BY THE ERRONEOUS ADMISSION OF THE PARTIALLY REDACTED CONFESSION OF THE NON-TESTIFYING CO-DEFENDANT.

The right of cross examination is included in the right of confrontation secured by the Sixth Amendment. *Pointer v Texas*, 380 US 400, 404, 85 S Ct 1065, 13 L Ed 2d 923 (1965); *United States v Gomez-Lemos*, 939 F2d 326, 329 (6th Cir 1991). The essence of the right of confrontation at trial is that it subjects the witness to cross examination, allows the jury to observe the

demeanor of the witness in order to assess credibility, and impresses upon the witness the importance of telling the truth by requiring an oath and subjecting the witness to the potential of prosecution for perjury. *California v Green*, 399 US 149, 158, 90 S Ct 1930, 26 L Ed 2d 489 (1970); *United States v Gomez-Lemos, supra* at 329. This Court, in *Bruton v United States*, 391 US 123, 88 S Ct 1620, 20 L Ed 2d 476 (1968) concluded that a defendant's right of confrontation is denied by the introduction of a non-testifying Co-Defendant's statement at a joint trial, even when the jury is instructed to consider the statement only against the Co-Defendant who made it. Subsequently in *Richardson v Marsh*, 481 US 200, 107 S Ct 1702, 95 L Ed 2d 176 (1987), this Court held that the admission of a nontestifying Co-Defendant's confession which is redacted to eliminate *all references* to the defendant would not violate the right of confrontation if accompanied by the appropriate cautionary instruction.

On two (2) separate occasions, the Assistant United States Attorney elicited the Co-Defendant's confession in this joint trial. Before questioning Agent Kacerosky about the Co-Defendant's confession, the government's attorney said:

> Now, I want to tell you something right now! *Pursuant to an objection by counsel concerning names of individuals, I don't want you to name any individual by name.* (Vol II, p. 24) (emphasis added).

This remark made it abundantly clear to the jury that it was an objection by Petitioner's counsel that was precluding the use of her name. This comment rendered the exclusion of her name totally meaningless. Moreover, in relating the Co-Defendant's confession to the jury, he failed to delete reference to Petitioner's existence and role in the crimes charged. The Co-Defendant's statement to Kacerosky was as follows:

> A. He indicated to me that he — he acknowledged that the transaction that had occurred he knew to

> involve cocaine. He indicated that he expected to be paid money for his participation in the scheme. *And he indicated that other individuals in Miami were involved in the scheme.* (Vol II, p. 24) (emphasis added).

Agent Ayala was also questioned about the Co-Defendant's confession. On direct examination, the following statement by the Co-Defendant was placed before the jury.

Q. What did he tell you about this deal?

A. Yes. *He told me that at the beginning he was approached by the person in Miami.*

Q. When you say "this person" he gave the name; correct?

A. Yes. *I'm trying not to say the name.* You said not to say.

Q. Okay. I just wanted to make sure that when you say "this person" he did, in fact, give a name and you now are putting the words in "this person"?

A. Yes.

Q. Okay. And what did this person discuss? According to the Defendant, what did this person discuss?

A. *He was offered by this person if he wanted to make some easy money. So he agreed,* and he was briefed what was the deal.

Q. Let me ask you this. *Without telling me the person's name, the person was not the confidential informant?*

A. No.

MR. ESCOBEDO: I'm going to object, Judge.

> THE COURT: I think you ought to move on. (Vol IV, pp. 58-59) (emphasis added).

Once again, the government's lawyer was making it clear to the jury who the person was that initially approached the Co-Defendant and offered a deal for him to make some easy money, by eliminating the confidential informant. The jury was to infer that it was the Petitioner given previous testimony that she was the only other person present during the initial discussions.

Additionally, in his closing argument to the jury, the government's lawyer wanted the jury to know that the Co-Defendant had, in fact, named the other participants, even though their names were not in evidence. In referring to the Co-Defendant's confession, he told the jury:

> The second one is longer. *He gives detailed information identifying people by name who are involved in this transaction with him* (Vol V, p. 31) (emphasis added).

It is improper for the government to make clear, through questioning, remarks and closing argument, that the jury is to infer who the redacted name is. *United States v Perez-Garcia,* 904 F2d 1534, 1541 (11th Cir 1990).

In short, while Petitioner's name was excised "any reference to [her] existence" was not eliminated. *United States v Marsh, supra,* 481 US at 200; *United States v DiCarlantonio,* 870 F2d 1058, 1062 (6th Cir 1989). The Co-Defendant's confessions expressly implicated Petitioner as the person in Miami who was involved in the scheme by approaching him to make money in the transaction. Given the government's questioning of the agents and closing arguments to the jury, certainly everyone knew that the Co-Defendant was referring to Petitioner Fontao. *United States v Payne,* 923 F2d 595, 597 (8th Cir 1991). This constitutional error was not harmless beyond a reasonable doubt. *Arizona v Fulminante,* 499 US ___, 111 S Ct 1246, 113 L Ed 2d 302 (1991);

Vincent v Parke, 942 F2d 989 (6th Cir 1991). The error is not harmless because "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction". *Schneble v Florida,* 405 US 427, 432, 92 S Ct 1056, 1060, 31 L Ed 2d 340 (1972).

II.

PETITIONER'S DUE PROCESS RIGHTS WHERE DENIED BY THE PRE-INDICTMENT DELAY.

The offenses for which Petitioner was convicted of occurred between January 10, 1988 and February 5, 1988. On January 13, 1993, some sixty (60) months later, a grand jury returned an indictment. By the time the case came to trial, three (3) essential witnesses were unavailable.

The Due Process Clause of the Fifth Amendment provides protection to an accused when a pre-indictment delay has prejudiced her rights at trial. *United States v McDonald,* 435 US 850, 98 S Ct 2182, 33 L Ed 2d 18 (1978); *United States v Marion,* 404 US 307, 92 S Ct 455, 30 L Ed 2d 468 (1971); *United States v Brown,* 959 F2d 63, 65 (1992); *United States v Atisha,* 804 F2d 920, 928 (6th Cir 1986), *cert denied,* 479 US 1067, 107 S Ct 955, 193 L Ed 2d 1003 (1987).

In the present case, Petitioner joined in two (2) Motion's to Dismiss the Indictment due to prejudicial pre-indictment delay (Vol V, pp. 112-113). Both were denied by the district court. Three (3) central figures of the alleged crimes were unavailable due to the delay, which constitutes substantial and actual prejudice to Petitioner's case.

Agent John Bilis posed as a source of supply for the cocaine in this "reverse-buy" (Vol I, p. 49). Bilis, acting as an undercover agent, met with the informant and Petitioner on several occasions, allegedly made arrangements for the exchange of the sham

cocaine for money, and was present when the transaction was to occur in Detroit (Vol II, p. 13; Vol III, pp. 36-53; Vol IV, p. 207). Although he was listed on the government's witness list, he was not produced at trial. At the time of trial, Bilis was no longer employed by the federal government and he could not be compelled to appear after leaving for Greece (Vol IV, pp. 206-207). It was conceded that some of the taped conversations that Bilis was present at were difficult to understand or were intelligible (Vol I, p. 60; Vol IV, p. 208).

Johnny Ace Smith, known as "Queen", was the alleged "money man" (Vol IV, p. 98). Collazo met Smith at a recording studio in Detroit, where they allegedly discussed the "type of merchandise" to be delivered, possible future deals and where Smith gave Collazo a black bag containing $300,000 (Vol III, pp. 60, 62). Smith was subsequently arrested at the studio (Vol III, p. 66). Smith was killed on March 10, 1989 (Vol V, p. 20).

Willie Lopez was present during meetings involving Petitioner, the informant and Agent Bilis (Vol I, pp. 84-85; Vol III, p. 38, 40). Lopez had a legitimate export business of goods and services to Cuba (Vol III, pp. 78, 81). Discussions regarding the transaction to be completed in Detroit were had at Lopez's house and place of business. One meeting was not taped (Vol III, p. 82). The government was unaware of the whereabouts of Lopez and had not kept track of where he was (Vol II, p. 79). Each of these witnesses would have been used to impeach and discredit the testimony of Mr. Collazo and to establish the Petitioner's lack of participation in the crimes for which she was convicted. Yet, this evidence was lost by the government's delay in bringing charges against the Petitioner.

III.

PETITIONER FONTAO WAS DENIED DUE PROCESS OF LAW BECAUSE THERE WAS INSUFFICIENT EVIDENCE AT TRIAL TO SUSTAIN A VERDICT ON ATTEMPT POSSESSION WITH INTENT TO DISTRIBUTE COCAINE AND WHERE THE TRIAL COURT ERRONEOUSLY DENIED PETITIONER'S MOTION FOR DIRECTED VERDICT.

The government's evidence was that Petitioner contacted the informant and subsequently met with the informant, undercover agents and the Co-Defendant in Florida as part of a "reverse-buy". Petitioner was not involved in shipment of cocaine, money laundering or any commission for the sale of cocaine. In fact, she was not present when the transaction was to occur. The trial court erroneously denied Petitioner's motion for directed verdict (Vol V, p. 10, 21). There was insufficient evidence to support a conviction for attempt possession with intent to distribute cocaine.

In order to obtain a constitutionally valid conviction, the government must present the fact finder with evidence sufficient to prove guilt. In, *In Re Winship*, 397 US 358, 90 S Ct 1068, 25 L Ed 2d 368 (1970). This Court specifically held:

> "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." US at 365.

The standard for reviewing the sufficiency of the evidence at trial consistent with the requirement that there be proof beyond a reasonable doubt. U.S. Const. Am. VI; *Jackson v Virginia*, 443 US 307, 316-319, 99 S Ct 2781, 61 L Ed 2d 560, *reh denied*, 444 US 890, 100 S Ct 195, 62 L Ed 2d 126 (1979).

In order to convict a person of attempt to commit a drug offense, the government must establish beyond a reasonable doubt, (1) the intent to engage in criminal conduct and, (2) the performance of an overt act which constitutes a substantial step toward the commission of the substantive offense, here, possession of cocaine with the intent to distribute. *United States v Perryman*, 889 F2d 104, 106 (6th Cir 1989); *United States v Williams*, 704 F2d 315, 321 (6th Cir 1983).

In the present case, it is undisputed that Petitioner was not present in Detroit when the transaction involving the money and sham cocaine occurred (Vol II, pp. 79, 89; Vol III, pp. 104-105). More importantly, it was never her intent or purpose to gain possession of narcotics, either directly or constructively. There is absolutely no evidence to even suggest that Petitioner had an intent to possess cocaine, or exercised any dominion or control over the drugs, either directly or indirectly. *United States v Craven*, 478 F2d 1329, 1333 (6th Cir 1973), *cert denied*, 414 US 886, 94 S Ct 54, 38 L Ed 2d 85 (1973).

IV.

PETITIONER FONTAO WAS DENIED A FAIR TRIAL BY THE DELIBERATE INJECTION INTO EVIDENCE BY AN AGENT THAT SHE WAS THE SUBJECT OF ANOTHER DRUG INVESTIGATION.

Evidence of other criminal acts is excluded when it is used to show that the defendant had a criminal propensity or was a person of bad character, likely to have committed the crimes charged in the indictment. In other words, when the evidence of other bad acts is being used to show the defendant committed the crime charged (she acted in conformity with that character trait or propensity on a particular occasion) the evidence is inadmissible. The rationale behind such a rule is obvious. Such character evidence distracts the trier of fact from the main question of what

actually happened in this particular case and permits conviction because the defendant is a bad person, despite what the evidence in the case actually shows. Thus, the use of such evidence must be circumscribed and limited. *United States v Balleaux*, 685 F2d 1105, 1109 (9th Cir 1982). Before evidence of other criminal conduct may be admitted pursuant to Rule 404(b), the government must meet certain prerequisites. *United States v Huddleston, supra*, 485 US at 691-692; *United States v French*, 974 F2d 687, 694 (6th Cir 1992); *United States v Bakke*, 942 F2d 972 (6th Cir 1991); *United States v Zelinka*, 862 F2d 92 (6th Cir 1988); *United States v Blankenship*, 775 F2d 735 (6th Cir 1985). The government bears the burden of proving admissibility of other alleged criminal behavior under Fed. R. Evid. 404(b); *United States v Huddleston*, 485 US 681, 108 S Ct 1496, 99 L Ed 2d 771 (1988); *United States v Mehrmanesh*, 689 F2d 822, 830 (9th Cir 1982). In the present case, there is no basis for admission of the testimony of the agent.

During cross examination by the Co-Defendant's attorney, the following occurred:

> Q. Were you personally aware of any other investigations that Mr. Collazo had been involved in prior to the investigation in question?
>
> A. Yes. As I stated, there was one other, my recollection is there was one other active investigation that was ongoing at that time. That investigation involved the use of Go-Fast vessels that would be used, which would mean very fast speed boats that were being used to smuggle cocaine, or were intended to be used to smuggle cocaine from the Bahamas to South Florida. The investigation became centered on the number of people. *There was an overlap and some of the subjects in that case*

> *were some of the subjects in this case.* (Kacerosky, Vol II, p. 43) (emphasis added).

The question posed was *whether* the agent was aware of investigations *Mr. Collazo* had been involved in. The answer only required an affirmative or negative response. The attorney never asked about what the investigation involved or who the targets of the investigations were.

The Courts have repeatedly condemned such conduct by agents of the government, who are presumed to know that the interjection of other alleged criminal acts by the defendant on trial are inadmissible and extremely prejudicial. *United States v Andrea,* 538 F2d 1255, 1256 (6th Cir 1976); *United States v Ortiz,* 507 F2d 1224. 1226 (6th Cir 1974). The issue is not waived by the attorney's failure to object. *United States v Gray,* 468 F2d 257 (3rd Cir 1972); *United States v Garber,* 471 F2d 212 (5th Cir 1972)." *Ortiz, supra,* 507 F2d at 1226. Review is under the plain error rule of Fed. R. Crim. P. 52(a). The evidence presented by the government, in this case, was not so overwhelming that this error could not have possibly affected the outcome of the case or affected Petitioner's substantial rights.

V.

PETITIONER WAS DENIED HER RIGHT OF CONFRONTATION WHEN THE TRIAL COURT REFUSED TO DISCLOSE THE PRESENTENCE AND PRETRIAL SERVICES REPORTS OF A WITNESS AND REFUSED TO ADJOURN THE TRIAL TO OBTAIN THE INCOME TAX RETURNS OF THE INFORMANT.

The right of cross examination and confrontation embodied in the Sixth Amendment is deeply rooted in our legal system. *Coy v Iowa,* 487 US 1012, 1015-1016, 108 S Ct 2798, 101 L Ed

2d 857 (1988); *United States v Gomez-Lemos,* 939 F2d 326, 329 (6th Cir 1991).

In the present case, the District Court unduly restricted counsel's right to cross-examine two (2) key adverse witnesses.

To a large extent, the motivation of the informant, Robert Collazo, to be involved and to see the case to completion was his agreement with the government that he would receive a certain amount of money seized. No written documentation of the money agreed upon or the amount received was placed into evidence. During cross-examination, Collazo testified that he received a $25,000 cash payment as an informant, but he could not recall if he reported it as income to the Internal Revenue Service (Vol III, p. 112). Collazo could not recall the exact amount he was paid in this case, whether it was $150,000, $147,000, or $145,000 (Vol III, p. 113). Although he was paid in 1989, Collazo testified he reported it as income on his tax return in 1992 (Collazo, p. 114). Defense counsel then sought Collazo's income tax returns for impeachment (Vol IV, pp. 4-5). The District Court judge told the defense if he got the returns "in time" he could use them because, the trial would not be adjourned (Vol IV, p. 5). When the Assistant United States Attorney indicated that no court order had been issued for the tax returns and that the expected time to obtain the returns was two (2) weeks, the district judge essentially ignored it (IV, pp. 4-5).

Robert Hills had pled guilty and was cooperating with the government. Prior to his testimony, the defense sought release of Hills Presentence Report and Pretrial Services Report (Vol I, p. 61; Vol III, p. 3). The District judge reviewed the documents, refused to disclose the content of the documents or allow the attorneys to review them, and ordered them sealed (Vol II, p. 3).

The trial court's refusal in both instances was clearly erroneous. Petitioner was entitled to documents she sought under both the authority of *Brady v Maryland*, 373 US 83, 83 S Ct 1194, 10

L Ed 2d 25 (1963) and the Jencks Act 18 USC § 3500. Since the credibility of both witnesses were crucial to the government's case "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. *Napue v Illinois* 360 US 264, 269, 79 S Ct 1173, 3 L Ed 2d 1217 (1959).

VI.

THE GOVERNMENT'S MISCONDUCT IN CLOSING ARGUMENTS VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL BY VOUCHING FOR THE CREDIBILITY OF A COOPERATING CO-CONSPIRATOR AND BY DENIGRATING PETITIONER'S RIGHT TO TRIAL, RIGHT TO COUNSEL, PRESUMPTION OF INNOCENCE, AND RIGHT TO HAVE THE GOVERNMENT PROVE HER GUILT BEYOND A REASONABLE DOUBT IN THIS CASE.

The standard for reviewing allegations of prosecutorial misconduct is whether the remarks deprived the defendant of a fundamentally fair trial. *United States v Young*, 470 US 1, 11, 105 S Ct 1038, 84 L Ed 2d (1985); *Donnelly v DeChristoforo*, 416 US 637, 642-643, 94 S Ct 1868, 40 L Ed 2d 437 (1974).

A.

VIOLATION OF PETITIONER'S RIGHT TO TRIAL, RIGHT TO COUNSEL, PRESUMPTION OF INNOCENCE AND THE GOVERNMENT'S BURDEN OF PROOF.

In his opening argument to the jury, the government's attorney argued the following, over objection.

> But in reality, *even though everybody knows they did it, even though we know the person confessed, they still have the right to come in here and have an attorney come in and try to argue that they didn't do it.*
>
> MR. VILLARRUEL: Objection, we don't have a burden to do anything. That's improper argument.
>
> MR. WATERSTREET: I didn't say they had a burden, Judge. I said they have an opportunity.
>
> THE COURT: Just proceed with your argument. Hopefully by 12:00 o'clock. (Vol V, p. 69) (Emphasis added).

Shortly thereafter, the government's attorney launched into an attack on its burden of proof, going outside the evidence in the case.

> It's not this impossible burden. *Jurors have made it every single day. People have been found guilty every single day.*
>
> MR. VILLARRUEL: Object to that, Judge, what juries do every day.
>
> THE COURT: Just proceed with your argument.
>
> MR. WATERSTREET: Thank you, Judge. (Waterstreet closing argument, Vol V, p. 70) (Emphasis added).

A defendant in a criminal case has an unqualified right to trial, to counsel to represent her at trial, and to be presumed innocent until and unless the government proves beyond a reasonable doubt her guilt. U.S. Const. Am, V, VI.

B.

PROSECUTORIAL VOUCHING

It is well known that the government may not vouch for the credibility of its witnesses by portraying the government as a guarantor of truthfulness. *Taylor v United States*, 985 F2d 844, 846 (6th Cir 1993); *United States v Monroe*, 943 F2d 1007, 1013 (9th Cir 1991); *United States v Wallace*, 848 F2d 1464, 1473 (9th Cir 1988). The jury could reasonably conclude that the government attorney was expressing his belief in Hill's testimony because the plea agreement required truthful testimony and the attorney argued he would get his deal only in exchange for truthful testimony. *United States v Causey*, 834 F2d 1277, 1283 (6th Cir 1987), *cert den*, 486 US 1034, 108 S Ct 2019, 100 L Ed 2d 606 (1988). The government's lawyer argued Hill's credibility as follows:

> Ladies and gentlemen, unfortunately, you will find out coke is not involved in this deal. I cannot bring the Pope in before you and have the Pope testify about the drug deal he did. I had to bring in people who were involved in the drug deal, drug dealers, people who admitted readily, I was involved in this drug deal, who admitted readily, *I am going to get something in return for my truthful testimony,* someone who admitted that, if I lie, it's all out the window and I go to jail for a long time. (Waterstreet closing argument, Vol V, p. 35).

The clear implication of this argument is that the government is guaranteeing the truth of the testimony by enforcing the truthfulness condition of its own plea agreement. *United States v Roberts*, 618 F2d 530, 533 (9th Cir 1980).

C.

THE MISCONDUCT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

This Court has recognized that although the cumulative effect of repeated improper remarks magnifies the prejudice, a "single misstep on the part of the prosecutor may be so destructive o the right of the defendant to a fair trial that reversal must follow. *United States v Smith, supra,* 500 F2d at 297. This would include prosecutorial comments which tend to "overthrow the presumption of innocence" as in the present case. *Pierce v United States*, 86 F2d 949 (6th Cir 1936). Reversal is required unless the reviewing court is able to declare a firm belief that misconduct is harmless beyond a reasonable doubt. *Boyde v California*, 494 US 370, 110 S Ct 1190, 108 L Ed 2d 3196 (1990); *Eberhadt v Bordenkircher*, 605 F2d 275, 278 (6th Cir 1979). Given that the case against Petitioner was not overwhelming the government is unable to establish beyond a reasonable doubt that the repeated constitutional errors were harmless. The repeated constitutional errors were not harmless.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner requests that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

FRANCISCO J. VILLARRUEL
(P34147)
Attorney for Petitioner
1633 First National Building
Detroit, Michigan 48226
(313) 963-3311

CRAIG A. DALY, P.C. (P27539)
Co-Counsel for Petitioner
577 E. Larned, Suite 240
Detroit, Michigan 48226
(313) 963-1455

Dated: June 24, 1996

Appendix

No. 95-1084, 95-1086

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* MIRIAM JUANA FONTAO, *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* ERIC PAGANI-GALLEGO, AKA ERIK PAGANI-GALLEGO, *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division

---

Before: NORRIS and SILER, Circuit Judges; and GODBOLD, Senior Circuit Judge.[1]

GODBOLD, Senior Circuit Judge. Eric Pagani-Gallego and Miriam Juana fontao were jointly tried and convicted of conspiracy to possess with intent to deliver cocaine, 21 U.S.C. §846,

[1] The Honorable John C. Godbold, United States Circuit Judge for the Eleventh Circuit, sitting by designation.

attempt to possess with intent to distribute cocaine, 21 U.S.C. §841(a)(1), and aiding and abetting, 21 U.S.C. §2. Pagani-Gallego and Fontao timely filed notices of appeal and challenge their convictions on several grounds. We affirm the convictions.

A. Denial of Right of Confrontation

Fontao's Sixth Amendment right of confrontation was not violated by the admission of the confession of Pagani-Gallego, who was not a witness at her trial. After the arrest of Pagani-Gallego police interrogated him and extracted a confession which was admitted at Fontao's trial through the testimony of Agent Kacerosky. Before the confession was read to the jury, the U.S. Attorney states:

> Now, I want to tell you something right now. Pursuant to an objection by counsel concerning names of individuals, I don't want you to name any individual by name.

The confession, redacted to omit Fontao's name, was read to the jury:

> He indicated to me that he — he acknowledge that the transaction that had occurred he knew to involve cocaine. He indicated that he expected to be money for his participation in the scheme. And he indicated that other individuals in Miami were involved in the scheme.

In closing argument the U.S. Attorney summarized the content of Pagani-Gallego's confession:

> He gives detailed information identifying people by name who are involved in this transaction with him.

Fontao did not object to the U.S. Attorney's statements or the admission of Kacerosky's testimony, or request a limiting instruction, so our review is limited to plain error.

The Sixth Amendment of the Constitution embodies the essential right of the accused in a criminal prosecution to have the opportunity to confront witnesses against her. In *Richardson v Marsh,* 481 US 200, 107 S Ct 1702, 95 L Ed 2d 176 (1987), the Court restricted this right by holding that the admission of a nontestifying codefendant's confession which is redacted to eliminate all references to the defendant would not violated the right of confrontation if accompanied by the appropriate cautionary instruction. This circuit interpreted this rule as allowing the introduction of a redacted confession "even if the codefendant's confession becomes incriminating when linked with other evidence adduced at trial." *U.S. v DiCarlantonio,* 870 F2d 1058, 1062 (6th Cir 1989), *cert denied,* 493 US 933 (1989).

There was no reversible plain error. In light of the strength of the other evidence produced by the government, error, if any, was harmless.

Second, the court's refusal to allow Fontao time to obtain the income tax returns of Collazo, the government paid informant, did not violate her right of confrontation. On the last day of trial Fontao's attorney requested copies of Collazo's income tax returns. The district judge instructed Fontao that he did not intent to delay the trial, but if Fontao could retrieve the records without delay the records would be admissible. The U.S. Attorney informed Fontao that she would have to seek a court order to move for an adjournment of the trial to retrieve the records because retrieval would require approximately two weeks. She did not seek a court order or move for an adjournment. This inaction limits our review to plain error.

The district court did not commit plain error in refusing to delay the trial so Fontao could retrieve the records. The delay would have extended the trial, which was almost over, for two weeks. Fontao's counsel cross-examined Collazo about his payment from the government even though she did not have his tax returns.

Third, the refusal of the district court to order the disclosure of the PSR of Robert Hills, a cooperating defendant, did not violate Fontao's right of confrontation. Our review is limited to the clearly erroneous standard.

The court examined the PSR and did not find any relevant information. The court stated: "I have examined the Pre-Trial Services Report of Robert Hills. I find nothing in it of arguable relevance." The district court's refusal was not clearly erroneous.

B. Sufficiency of the Evidence

Fontao challenges her conviction under 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 on the ground that the government failed to prove every element of her offense beyond a reasonable doubt as required by *In re Winship,* 397 US 358, 361, 90 S Ct 1068, 25 L Ed 2d 368 (1970).

The government must prove two elements to convict a person of attempting to commit a cocaine offense: (1) the intent to engage in the possession with intent to distribute cocaine; and (2) the commission of an overt act which constitutes a substantial step toward the possession with intent to distribute cocaine. *U.S. v Pennyman,* 889 F2d 104, 106 (6th Cir 1989). Fontao asserts that the government failed to prove that she had intent to possess or did possess cocaine.

This challenge has no merit and sufficient evidence supports the conviction. Fontao contacted Collazo to obtain a cocaine

supplier; she conducted two meetings in Miami where she discussed the quantity of drugs and the persons who would be involved in the sale of the cocaine; and she arranged to bring the buyers and sellers together. This evidence tends to prove that she intended to engage in the possession with intent to distribute cocaine and that she participated in overt acts which constituted a substantial step toward her possession with intent to distribute.

C. Prosecutorial Misconduct

The following are statements of the U.S. Attorney made in opening remarks and in closing argument:

> [OPENING REMARKS]
> Ladies and gentlemen, unfortunately, you will find out coke is not involved in this deal. I cannot bring the Pope in before you and have the Pope testify about the drug deal he did. I had to bring in people who were involved in the drug deal, drug dealers, people who admitted readily, I was involved in this drug deal, who admitted readily, I am going to get something in return for my truthful testimony, someone who admitted that, if I lie, it's all out the window and I go to jail for a long time.
>
> [CLOSING ARGUMENT]
> But in reality, even though everybody knows they did it, even though we know the person confessed, they still have the right to come in here and have an attorney come in and try to argue that they didn't do it.
>
> * * *
>
> [The reasonable doubt standard is]not this impossible burden. Jurors have made it every single day. People have been found guilty every single day.

These statements did not violate Fontao's right of due process and did not constitute prosecutorial misconduct. They were not egregious or continuous. *U.S. v Bess,* 593 F2d 749 (6th Cir 1979). At most the comments constituted harmless error which does not provide a ground for reversal.

D. Agreement with Informant

The government agreed to pay Collazo, the informant, 25% of the money seized from the investigation, resulting in a payment of approximately $145,000. The admission of Collazo's testimony did not violate the constitutional rights of Pagani-Gallego.

The Fifth Circuit held in *U.S. v Cervantes-Pacheco,* 826 F2d 310, 315 (5th Cir 1987), *cert denied,* 484 US 1026 (1988), that "an informant who is promised a contingent fee by the government is not disqualified from testifying in a federal criminal trial." Following this rule the government had the authority to compensate Collazo. Although the amount of the payment is great, the influence the payment had on the testimony goes to credibility and not admissibility.

E. Denial of Due Process by Pre-Indictment Delay

Pre-indictment delays did not deny Fontao or Pagani-Gallego of their right to due process. Fontao's offense occurred between January 10, 1988 and February 5, 1988, but she was not indicted until approximately 60 months later, on January 13, 1993. pagani-Gallego was arrested on February 2, 1988, but the indictment was not returned against him until January 20, 1993. Appellants argue that this delay caused three essential witnesses to be unavailable: Agent Bilis, Johnny Ace Smith and Willie Lopez.

In *U.S. v Lovasco,* 431 US 783, 97 S Ct 2044, 52 L Ed 2d 752 (1977), the court required the defendant to show both

(1) substantial prejudice to his right to a fair trial and (2) an intentional delay by the government to obtain a tactical advantage before a due process violation was present. The defendant must demonstrate "in a 'definite and not speculative' manner how the loss of the witness or other evidence was prejudicial." *U.S v Loud Hawk,* 816 F2d 1323, 1324 (9th Cir 1987).

Fontao and Pagani-Gallego did not prove either prong. The only evidence of the prejudice was purely speculative. Fontao admitted that she did not know "what Agent Bilis would have testified to." Tr. V at 18. No proffer was made to the court of the proposed testimony. "Mere assertions that the testimony of missing witness might have been useful... [do] not constitute the proof of prejudice required... If the 'actual content' of the lost testimony was not before the court, it could not determine whether that testimony would have been beneficial or detrimental to the defendant." *Loud Hawk,* 816 F2d at 1325.

The appellants did not establish that the government gained a tactical advantage by the delay or that there was any due process violation.

F. Denial or Right to Fair Trial

The district court did not err in admitting evidence of prior bad acts under Fed. R. Evid. 404(b). Fontao and Pagani-Gallego challenge two statements admitted in evidence. First, Agent Kacerosky testified:

> Q. Were you personally aware of any other investigations that Mr. Collazo [the government informant] had been involved in prior to the investigation in question?
>
> A. Yes. As I stated, there was one other, my recollection is there was one other active investigation that was ongoing at that time. that investigation

> involved the use of Go-Fast vessels that would be used, which would mean very fast speed boats that were being used to smuggle cocaine, or were intended to be used to smuggle cocaine from the Bahamas to South Florida. The investigation became centered on the number of people. There was an overlap of some of the subjects in that case were some of the subjects in this case.

Second, the government presented evidence that Pagani-Gallego offered to launder the money obtained after the buy and that Pagani-Gallego was highly capable of laundering the money due to past acts of money laundering.

The Sixth Circuit employs a three-part test in determining the admissibility of evidence under Rule 404(b): (1) the government must introduce evidence so that a reasonable jury could conclude that the act occurred; (2) the subsequent act must be probative of a material issue other than character; and (30 the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403, 404.

Our standard of review is limited to plain error because the evidence was introduced without objection. the admission of this testimony did not result in plain error. The evidence fits into the exceptions in Rule 404(b). A court may admit evidence of other wrongs "if those other crimes or acts are relevant to intent or knowledge which are elements of the crime charged." *U.S. v Lash*, 937 F2d 1077, 1087 (6th Cir 1991), *cert denied*, 502 US 949 (1991). Pagani-Gallego's offer to launder money was part of the continuing pattern of illegal activity. The evidence concerning Fontao went to prove intent. The district court did not commit plain error.

Appendix

G. Explanation of Drug Code Words

Agent Edward Kacerosky testified as an expert and identified the meaning of code words used in the drug trade. this testimony did not invade the province of the jury because the average juror is not capable of understanding the meaning of code words used in the drug trade.

This circuit established the well-recognized rule in *U.S. v Pearce*, 912 F2d 159, 163 (6th Cir 1990), *cert denied*, 498 US 1093 (1991), that "[l]aw enforcement officers may testify concerning the methods and techniques employed in an area of criminal activity and to establish 'modus operandi' of particular crimes. Knowledge of such activity is generally 'beyond the understanding of the average layman' " (quoting *U.S. v Espinosa*, 827 F2d 604, 611 (9th Cir 1987), *cert denied*, 485 US 968 (1988).

This testimony was beyond the knowledge of the average juror and was proper.

AFFIRMED.